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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/019,402

12/28/2001

Hitoshi Matsumoto

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EXAMINER

JAGOE, DONNA A

ART UNIT

PAPER NUMBER

1614

MAIL DATE

DELIVERY MODE

10/16/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

<p align="center">Advisory Action Before the Filing of an Appeal Brief</p>	Application No. 10/019,402	Applicant(s) MATSUMOTO ET AL.	
	Examiner Donna Jagoe	Art Unit 1614	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 11 August 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
 b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☒ The Notice of Appeal was filed on 11 August 2008. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
 (a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
 (b) ☐ They raise the issue of new matter (see NOTE below);
 (c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
 5. ☐ Applicant's reply has overcome the following rejection(s): _____.
 6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
 7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
 The status of the claim(s) is (or will be) as follows:
 Claim(s) allowed: _____.
 Claim(s) objected to: _____.
 Claim(s) rejected: 27-30, 32-40, 44 and 49.
 Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
 12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____.
 13. ☐ Other: _____.

/Ardin Marschel/
Supervisory Patent Examiner, Art Unit 1614

/D. J./
Examiner, Art Unit 1614

Continuation of 3. NOTE: Claim 30, drawn to the process for producing black currant anthocyanin-containing food composition contains a new weight % limitation that would require further search and consideration.

Continuation of 11. does NOT place the application in condition for allowance because: Applicant states that the amendment to claim 30 do not add any new limitations, however, it appears to change the limitations of the process claims. Applicant asserts that Nakmedov teaches monosaccharide. In response, the rejection is based on the composition of table 1. However, regarding the assertion of the sugar content, the instant claims are drawn to a "monosaccharide free composition. Sugars can be monosaccharides, disaccharides and complex carbohydrates. Absent evidence to the contrary, Nakhmedov et al. teach a sugar, not a monosaccharide. Applicant again points to table 3, drawn to a "molded" coloring agent. stating that such a molded composition would not be considered a food composition. In response, the rejection is based on "table 1". In prior art disclosures there are typically many embodiments of the composition/method disclosed. In this case, Table 1 of Nakhmedov et al. teach substantially the same composition as that disclosed in the instant claims. Applicants' reliance on the post filing date references, Viljakainen to allegedly provide evidence of surprising results is not persuasive. The determination of obviousness or nonobviousness must be based upon what was known in the art at the time the invention was made. See 35 U.S.C. § 103: "A patent may not be obtained...if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art". The Boccorh et al. reference is noted, however, applicant's claims are drawn to the composition wherein monosaccharides are "not found". Applicant has not disclosed the method of discovery of the monosaccharide. To state that it is "not found" but not disclose a method by which one has searched does not teach how to make and use the invention. Applicant asserts that Nakhmedov is concerned with obtaining a dye and the presently claimed invention is directed to obtaining a food composition "substantially free of monosaccharide and having a low content of organic acid". In response to applicant's argument, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. The prior art "dye" is capable of being consumed, so it meets the claim. Applicant is directed to the Lawhon et al. rejection above wherein Lawhon et al. teach purifying and concentrating juice such as currant juice through by reverse osmosis and optionally by ion exchange resin. It teaches currants. It would have been obvious to substitute black currant juice instead of currant juice since Lawhon et al. teach the reverse osmosis and ion-exchange to be employed for currant juice. It is prima facie obvious to substitute equivalents motivated by the reasonable expectation that the respective species will behave in a comparable manner or give comparable results in comparable circumstances. In re Ruff 118 USPQ 343; In re Jezel 158 USPQ 99; the express suggestion to substitute one equivalent for another need not be present to render the substitution obvious. In re Font, 213 USPQ 532. Since the process is applicable to currants one of ordinary skill in the art would have been motivated to employ the method of extracting the juice from black currants by reverse osmosis and/or ion-exchange resin since Lawhon et al. teach it to be useful to produce juice from currants.

Although Lawhon does not specifically recite a "charged" reverse osmosis (RO) membrane, example 4 in column 10 recites that the RO membrane system is stated to have a 99% rejection for NaCl. It is well known in the art that reverse osmosis is capable of rejecting bacteria, salts, sugars, proteins, particles, dyes and other constituents that have a molecular weight of greater than 150 to 250 Daltons. the separation of ions with reverse osmosis is aided by charged particles. This means that dissolved ions that carry a charge, such as salts, are more likely to be rejected by the membrane than those that are not charged, such as organics. The larger the charge and the larger the particle, the more likely it will be rejected. Since the invention of Lawhon et al. rejects 99% NaCl, the RO membrane is aided by charged particles. Applicant asserts that the claim language "food composition" distinguishes over the prior art. In response, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. The structural differences alleged by the Applicant are not readily apparent to the Examiner.

/Ardin Marschel/
Supervisory Patent Examiner, Art Unit 1614